No. 14949.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

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Opinion Below.

The Memorandum for Order of the District Court [R. 128-129] is not reported.

Jurisdiction.

This suit was filed in the District Court for the Southern District of California by Martin's Auto Trimming, Inc., on its own behalf and "on behalf of all other simi-

larly situated" [R. 4, 88] against T. C. Coleman Andrews (incorrectly described as Acting Collector of the Internal Revenue Service) and Robert A. Riddell (Director of the Internal Revenue Service for the Southern District of California).[1] The complaint and amended complaint prayed that the defendants and their employees be permanently enjoined from collecting the excise taxes referred to therein. [R. 21, 110.] A motion to dismiss was filed on behalf of defendant Andrews on the ground that the court lacked jurisdiction over his person since, as Commissioner of Internal Revenue, his official situs and legal domicile was in the District of Columbia. [R. 116-117.] But the District Court did not rule on that motion inasmuch as it decided that the plaintiff was not entitled to any injunctive relief. Judgment granting defendant Riddell's motion to dismiss was entered August 18, 1955. [R. 136-138.] Notice of appeal to this Court was filed on September 8, 1955, which was within sixty days. [R. 139-140.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

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[1]It will be seen that in the complaint [R. 1-22] and the amended complaint [R. 88-111], as well as elsewhere in the record, the term "plaintiffs" is generally used instead of "plaintiff" but these other persons who are allegedly interested in this suit were actually not parties. That should be evident since none of them entered an appearance and even the list of such persons attached to the amended complaint was admittedly not complete. [See R. 89.] Moreover, although the attorney for Martin's Auto Trimming, Inc., refers in his brief here to "the plaintiffs" the brief indicates that that corporation is the only appellant and so in fact the only party, and that is our position now as it was also in the District Court. See in this connection the defendants' motion to strike [R. 114-116] which the District Court did not pass on, apparently due to the fact that it decided to grant the motion to dismiss instead. These other persons have of course been referred to in an attempt to show that this is a class action but we do not concede that it is or could be such an action.

Questions Presented.

1. Whether, in view of the specific prohibition in Section 2201 of 28 U. S. C., the appellant is entitled to any declaratory relief from the proposed assessment of excise taxes under Section 3403(c) of the 1939 Internal Revenue Code.

2. Whether Section 7421 of the 1954 Internal Revenue Code prohibits the appellant from securing an injunction restraining the proposed assessment and collection of the excise taxes under Section 3403(c) of the 1939 Internal Revenue Code.

Statutes and Other Authorities Involved.

The pertinent provisions of the statutes and other authorities involved are set forth in the Appendix, *infra.*

Statement.

The facts as found by the District Court [R. 130-134] are as follows:

Martin's Auto Trimming, Inc. (generally referred to herein as the appellant), is a California corporation engaged in the business of operating an automobile upholstery shop in the Southern District of California. In carrying on this business appellant made seat covers which it sold to individuals and also to new and used car dealers. The Commissioner of Internal Revenue proposed an assessment of the manufacturers' excise tax against the appellant for the manufacture and sale of custom-made seat covers for the period August 1, 1950, to August 31, 1952, in the sum of $11,917.73. Thereafter this action was allegedly brought by the appellant on behalf of itself, William H. Martin, an individual, and 184 other businesses located within the Southern Judicial District

of California and allegedly similarly situated. [R. 130-131.]

The District Director of Internal Revenue for the Los Angeles District of California has only 12 cases where tax audits have been made to determine whether a manufacturer who makes or sells seat covers is liable for additional excise taxes imposed by the provisions of Section 3403(c) of the Internal Revenue Code of 1939, as amended. [R. 131.]

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amount and for the period indicated above was given to the appellant and it was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, appellant requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, appellant again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, appellant again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, appellant again requested, and was granted, a postponement of the conference to November 4, 1954. [R. 132.]

The complaint in this action, which was filed by appellant on October 29, 1954, requested both a preliminary and permanent injunction to restrain the assessment and collection of these taxes against appellant and 184 other persons allegedly similarly situated. The complaint also alleged that appellant and the other auto upholstery shops

for whom this action was brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses. Also in an affidavit filed together with the motion for preliminary injunction on October 29, 1954, the affiant, William H. Martin, president of Martin's Auto Trimming, Inc., stated "that in order for him [Martin] to pay this tax he would actually be forced to mortgage his home." [R. 132-133.]

Under Regulations promulgated by the Secretary of the Treasury, appellant was entitled to full administrative hearing prior to assessment of the tax. Also, after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which would defer the collection of the tax until disposition of the claim. The appellant failed to exhaust its administrative remedies. [R. 133.]

On January 21, 1955, appellant filed what is called the first amended complaint. [R. 88-111.] Such complaint requests declaratory relief in each of the causes of action set out therein and also attacks the validity of the federal tax. [R. 134.]

There are no exceptional circumstances alleged or shown in the pleadings and affidavits which would bring the causes of action set forth in the first amended complaint within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes. [R. 134.]

Appellant and the others referred to may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the Government or the Director in the United

States District Court or the Government in the United States Court of Claims and thus secure an adjudication of the merits of the controversy in an orderly process. [R. 134.]

In view of the above findings, the District Court reached the following conclusions [R. 134-136]:

1. This is an action seeking to restrain the assessment and collection of internal revenue taxes and is prohibited by Section 7421 of the Internal Revenue Code of 1954. [R. 134.]

2. There are no exceptional circumstances which would except this case from the provisions of either 28 U. S. C., Section 2201, the Declaratory Relief Act, or Section 7421 of the Internal Revenue Code of 1954. [R. 134-135.]

3. Plaintiffs[2] would not suffer irreparable injury and are not in such exceptional circumstances as to render inadequate their remedies at law; mere difficulty in raising the money to pay the taxes, or having to borrow the money is not enough. [R. 135.]

4. Plaintiffs have failed to exhaust administrative remedies available to them. [R. 135.]

5. The relief sought is in the nature of declaratory relief with respect to federal taxes and is barred by 28 U. S. C., Section 2201. [R. 135.]

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[2]Although the District Court used the term "plaintiffs" as indicated above, it did not pass on the question of whether the alleged 184 additional persons and/or companies were in fact proper parties or could be considered as such, and since the requested relief was denied, it apparently thought a ruling on their status was unnecessary.

6. Defendants are entitled to order denying motion for preliminary injunction. [R. 135.]

7. Plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction. [R. 135.]

8. Whether or not this is a proper class action is immaterial to the decision denying a preliminary injunction, particularly in view of the concurrent judgment dismissing this action, and the court specifically declines to pass on the now unnecessary question raised by defendants' motion to strike. [R. 135-136.]

Accordingly the District Court denied the requested injunction in a judgment entered August 18, 1955. [R. 136-138.]

Summary of Argument.

The District Court correctly held that the appellant here is not entitled to any declaratory relief from the proposed assessment of the excise tax involved here. Such relief is specifically prohibited in all tax matters by the statute relating to declaratory judgments.

The District Court also correctly held that the appellant is not entitled to an injunction against the proposed tax assessment. Another statutory provision of long standing specifically prohibits suits to restrain the assessment or collection of any federal tax, and must be applied unless there are extraordinary or exceptional circumstances. The District Court found that there were no such circumstances here and its finding is supported by the

record and is in accord with many cases in which injunctions have been denied.

In contending for the injunction, appellant asserts that the proposed assessment will cause hardship and irreparable damage and that the tax, as administered, violates its constitutional rights. But it has been repeatedly held that neither of these contentions is sufficient. Appellant's other contentions also fail to indicate any extraordinary circumstance which would warrant the issuance of an injunction. Even if it were true, as appellant argues, that it does not owe the proposed tax, such an allegation does not entitle it to equitable relief. Moreover the question of whether or not it owes the proposed tax is not one which can be decided in this suit. Actually it appears from the record here and the applicable statutory provisions that appellant is a manufacturer and is liable for the excise tax imposed on manufacturers who make and sell automobile accessories. But appellant's status and the validity of the tax can only be decided in a suit for a refund after the tax proposed has been paid. Such procedure is so well established that it is no longer open to question. Therefore appellant is in error in contending that it does not have an adequate remedy at law. It is equally in error in asserting that the proposed assessment may cause a multiplicity of suits, but even if it does, such a possibility is not a ground for allowing an injunction.

ARGUMENT.

I.

The District Court Correctly Held That Appellant Is Prohibited by Section 2201 of 28 U. S. C. From Securing Any Declaratory Relief From the Imposition of Excise Taxes.

The District Court was of the opinion that the last five causes of action in the amended complaint [R. 96-111] represent an effort on the part of appellant here to secure relief by means of a declaratory judgment and this appears to be admitted by appellant in its first contention. (Br. 15.) But, as the District Court held [R. 128], such declaratory relief cannot be granted with respect to federal tax questions. See Sec. 2201, 28 U. S. C. (Appendix, *infra*); *Noland v. Weston,* 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938; *Royce v. Squire,* 168 F. 2d 250 (C. A. 9th); *Taylor v. Allan,* 204 F. 2d 485 (C. A. 10th); *Wilson v. Wilson,* 141 F. 2d 599 (C. A. 4th); *William B. Scaife & Sons Co. v. Driscoll,* 94 F. 2d 664 (C. A. 3d), certiorari denied, 305 U. S. 603; and *Beeland Wholesale Co. v. Davis,* 88 F. 2d 447 (C. A. 5th), certiorari denied, 300 U. S. 680. Consequently the District Court properly held that such declaratory relief is barred by Section 2201.

In attempting to get around the specific prohibition of Section 2201 and decisions like those in the above cases, appellant asserts (Br. 15) that a declaratory judgment may be entered, or an injunction issued, where there are extraordinary circumstances and cites (Br. 16) in sup-

port of its contention *Tomlinson v. Smith,* 128 F. 2d 808 (C. A. 7th). But the one seeking relief in that case was not the taxpayer. Instead, it was a trustee who had a valid lien against taxpayer's property before the Collector of Internal Revenue acquired any right to collect the taxes involved. The court thought that fact material. Therefore it held that the language of Section 2201 in specifically excepting federal taxes from the Declaratory Judgment Act applies to suits by taxpayers and not to those brought by third parties. However, in clarifying its position, the court pointed out (p. 811) that:

> It does not follow, from what we have said, that the court has jurisdiction to enter a declaratory judgment as to the validity of the tax which defendant has sought to impose upon the partnership. We think that such a declaration is precluded by the exception contained in the Declaratory Judgment Act.

In view of the facts there and the court's explanation of its position, it is evident that the *Tomlinson* case does not help the appellant here. Moreover it is doubtful whether the courts rendering the decisions in the above cases would go as far as the Seventh Circuit did. Certainly those cases state unequivocably that there is no authority for rendering a declaratory judgment in respect to federal tax questions.

II.

The District Court Correctly Held That the Appellant Is Not Entitled to an Injunction Against the Proposed Assessment of Excise Taxes Under Section 3403 of the 1939 Internal Revenue Code.

Section 7421(a) of the 1954 Internal Revenue Code (Appendix, *infra*), which is a reenactment of 1939 Code Section 3653(a) and also of Section 3224 of the Revised Statutes, provides, with exceptions not material here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The District Court held that that section prohibited the granting of appellant's request for injunction here because there are no extraordinary or exceptional circumstances which bring this case within any of the recognized exceptions to the statute. In reaching that conclusion, the District Court also decided that the appellant has an adequate remedy at law and is not entitled to equitable relief. We submit that the District Court's decision is amply supported by the facts and is in accord with many decisions.

Notwithstanding the well-established rule set forth in such cases, appellant contends that it is entitled to an injunction restraining the proposed assessment under 1939 Code Section 3403(c) (Appendix, *infra*). Among the reasons advanced by appellant in the brief here or in its complaints [R. 1-22, 88-111] are (1) that imposition of this tax would cause great hardship and even irreparable injury not only to appellant but to others similarly situated; (2) that there is no adequate remedy at law; (3)

that appellant is not a manufacturer and so is not liable for the tax imposed by Section 3403(c); (4) that such tax, as administered, is unconstitutional; and (5) that the Collector of Internal Revenue may be barred by estoppel because of alleged changes in rulings on such tax. We cannot accept appellant's reasons for, as we shall now point out, the same or similar reasons have been repeatedly considered by the courts and have been found insufficient for granting an injunction to restrain the assessment of federal taxes.

The reason which appellant seems to have emphasized most in its complaints and affidavits was the great hardship which the proposed assessment may cause. However, neither the appellant nor any of those allegedly interested in this suit have produced any financial statements to support this allegation of hardship. But even if it is true, it would not be a sufficient reason for an injunction. See *Matcovich v. Nickell,* 134 F. 2d 837 (C. A. 9th), in which it was held that neither irreparable injury nor illegal exaction of a tax is sufficient basis for enjoining the assessment of such tax. In reaching that conclusion this Court cited with approval *Kaus v. Huston,* 120 F. 2d 183 (C. A. 8th), in which it was said (p. 185):

> The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. That the appellant is in poor financial condition, that it will be a hardship upon him to pay the taxes and sue for their recovery, that to compel him to pay them threatens ultimate ruin to his business, and that a court of Iowa has ruled that appellant was not an employer of the drivers of his cars

> and was not liable for contributions under the Iowa Unemployment Compensation Law, Chap. 77.2, Code of Iowa, 1939, §1551.07 *et seq.*, we do not regard as "special and extraordinary circumstances" which would justify the maintenance of this action to enjoin the collection of these taxes.

For cases in accord see *Jewel Shop of Abbeville, South Carolina v. Pitts,* 218 F. 2d 692 (C. A. 4th); *Milliken v. Gill,* 211 F. 2d 869 (C. A. 4th), certiorari denied, 348 U. S. 827; *Dyer v. Gallagher,* 203 F. 2d 477 (C. A. 6th); *Sturgeon v. Schuster,* 158 F. 2d 811 (C. A. 10th), certiorari denied, 331 U. S. 817; *Burke v. Mingori,* 128 F. 2d 996 (C. A. 10th), certiorari denied, 317 U. S. 662; and *Reams v. Vrooman-Fehn Printing Co.,* 140 F. 2d 237 (C. A. 6th).

In the *Reams* case, just cited, the Sixth Circuit considered whether the unconstitutionality of a tax could be a proper basis for an injunction and, in holding that it was not, explained the philosophy behind the statutory provision here as follows (pp. 240-242):

> The principle that a taxpayer may not bring a suit in equity for the purpose of restraining the assessment or collection of a tax has long existed. Public necessity gives the rule vitality. The Internal Revenue Code, 26 U. S. C. A. §3653, codified the limitation upon the equity powers of federal courts to restrain the collection of taxes and fortified the policy of allowing the government to be unhampered in the collection of its revenue. *No independent equity jurisdiction appearing, the statute applies, even where the collection or assessment of the tax is unwarranted.* *Graham v. Dupont,* 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *Keogh v. Neely,* 284 U. S. 583, 52 S. Ct. 39, 76 L. Ed. 504. Unless there is a clear showing that a taxpayer will suffer a wrong without any other remedy, *neither the validity*

> *or accuracy, nor the constitutionality of a tax may be tested in an action brought to restrain its collection only and it is immaterial that the collection of the tax is wholly void or that the object sought to be taxed is beyond the purview of the taxing statute.* The concept of the statutory prohibition against the injunction is what the revenue statutes prescribe a complete method for the ultimate determination of the correct tax and that since the taxpayer has a proper remedy thereunder, the courts will not interfere with the summary collection of the taxes.
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> * * * * * * * *
>
> Hardship in raising money with which to pay taxes is now common to all taxpayers, but this is not a special circumstance conferring equity jurisdiction on the courts to prevent collection by injunctive process. (Italics supplied.)

Also see *Bailey v. George,* 259 U. S. 16, holding that an averment that the taxing statute is unconstitutional is not grounds for an injunction and *Voss v. Hinds,* 208 F. 2d 912 (C. A. 10th), holding that neither the validity nor the constitutionality of the tax involved constitutes a sufficient basis for an injunction to restrain the collection thereof.

It is evident that the above cases not only dispose of appellant's point relative to its constitutional rights but also answer its allegation that the proposed tax is invalid because it is not a manufacturer. Obviously, in making that contention the appellant is attempting to bring its case within the ruling of *Miller v. Nut Margarine Co.,* 284 U. S. 498, on which it relies so heavily (Br. 21-24), but that case is clearly distinguishable. There the company seeking the injunction was the manufacturer of a product which was not oleomargarine. Thus it could

not be legally taxed under the act imposing a tax on oleomargarine. Accordingly, since the Supreme Court found that there was "no legal possibility" (p. 510) of a valid oleomargarine tax being imposed on the manufacturer involved there, it granted an injunction to restrain collection of such tax.

But the situation is different here for it is evident that there is a legal possibility of the imposition of a valid tax in this case, and appellant is not in a position to deny such possibility. As to this, the record shows that the appellant is and has been engaged in the busines of making and selling seat covers to new and used car dealers and to individual owners. [R. 4, 89, 130-131.] Moreover, the revenue law has long imposed an excise tax on the manufacturer who sells automobile accessories (see 1939 Code Sec. 3403(c)) and the Regulations relating to that section are broad enough not only to include the appellant here as a manufacturer but also to include a seat cover as an automobile accessory (see Secs. 316.4 and 316.55 of Treasury Regulations 46 (Appendix, *infra*)). Thus, under the ruling in *Miller v. Nut Margarine Co., supra,* it becomes clear that there is definitely a legal possibility that a valid tax can be imposed on the appellant under Section 3403(c) and that this is not a proper case for enjoining the assessment of such tax.

However, while it is our opinion that the appellant and others similarly situated are in fact manufacturers and should pay the tax required by Section 3403(c), we do not think that we can properly consider any question here as to the scope or validity of the proposed tax. In other words, the applicable decisions indicate that in a suit to enjoin collection of a tax, consideration must be limited to those factors which indicate the presence or absence

of exceptional and extraordinary circumstances. As to this see *Jewel Shop of Abbeville, South Carolina v. Pitts,* 218 F. 2d 692, 694 (C. A. 4th), in which it was held that although the District Court had correctly denied the injunction it had gone beyond its powers in attempting to determine anything more than whether there were extraordinary circumstances justifying the relief. Since the District Court had appointed a receiver, who as a special master had taken evidence on the amount of excise and income taxes due, the Fourth Circuit remanded the case to revoke the appointment of the receiver and to dismiss the complaint without prejudice of the taxpayer to litigate its tax obligations in a proper forum.

Obviously the appellant here is also entitled to have such questions considered by the proper forum and should be allowed to make a defense to the proposed imposition of such tax in that forum but that will be in a suit for refund and not in a case for equitable relief. Being of that opinion, we also consider it unnecessary to discuss the possible effect of alleged changes in the Treasury rulings with reference to a manufacturer's liability under Section 3403(c). However, as appellant refers (Br. 38) to the administrative ruling S. T. 944, 1952-2 Cum. Bull. 255, and implies that it is not a fair interpretation of the statute, we set forth such ruling in our Appendix, *infra,* to show that the official interpretation as to a tax on manufacturers who sell to new and used car dealers (to whom the major portion of appellant's sales were made) was not changed by that ruling.[3] The scope of

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[3]Although appellant purportedly set out the above ruling in its complaints [R. 13, 98], actually the paragraph quoted therein is merely an abbreviated statement relative to the ruling which appeared in paragraph 76,339 of the 1952 Prentice-Hall Federal Tax Service and such statement, because of its brevity, is obviously misleading.

this ruling was fully explained by R. J. Bopp, Chief of the Excise Tax Branch, in a letter appearing in the record at pages 67-70. For further information concerning history and scope of various rulings pertaining to Section 3403(c) see the brief filed on behalf of the appellee in *Hirasuna v. McKenney,* which is now pending in this Court (No. 14995).

Another contention of the appellant is that it should be allowed an injunction against the proposed assessment because it has no adequate remedy at law, but the District Court found otherwise and properly so. The appellant does not deny that it will be allowed to sue for a refund if the proposed excise tax is assessed and collected and actually gives no acceptable reason why it should not do so. Appellant does argue (Br. 28-32) that it was not required to avail itself of the various administrative remedies which were specifically brought to its attention. [R. 55, 112-113, 121-128.] However, even if that is a correct statement, appellant did indicate from time to time that it would confer with internal revenue officials about the proposed assessment [R. 57-58] and it seems strange that it did not do so since it is contending here that the proposed assessment is discriminatory and unfair. But, regardless of whether it should have availed itself of administrative remedies, it is evident that it does have an adequate remedy at law.

As the Supreme Court stated years ago in *State Railroad Tax Cases,* 92 U. S. 575, 613:

> It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. * * *
>
> The government of the United States has provided, both in the customs and in the internal reve-

> nue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

The Supreme Court again pointed out in *Snyder v. Marks,* 109 U. S. 189, that the inhibition of the statutory provision here applies to all assessments of taxes made under color of their office by internal revenue officers charged with assessing taxes, and stated that (p. 193):

> The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. *The remedy so given is exclusive, and no other remedy can be substituted for it.* (Italics supplied.)

In other words, although Congress has denied courts the judicial power to restrain the collection of taxes, it has given a taxpayer an adequate remedy by allowing it to recover any unjust exactions in a suit at law. Consequently the question of whether a tax is rightfully due from a person may be determined only in a suit for refund. *Jacoby v. Hoey,* 86 F. 2d 108 (C. A. 2d), certiorari denied, 299 U. S. 613. And that is true even though the person involved contends, as in this case, that he is not a manufacturer and does not owe the tax which may be assessed. See *Burke v. Mingori, supra; Rothensies v. Lichtenstein,* 91 F. 2d 544 (C. A. 3d); and *Larson v. House,* 112 F. 2d 930 (C. A. 5th).

Furthermore, since we have already shown that hardship and the alleged irreparable damage to appellant's business are not sufficient bases for the requested injunction, it is also obvious that such hardship and alleged damage cannot be advanced here as reasons for contending that there is no adequate remedy at law. Neither can appellant advance as a reason that the denial of the injunction might result in a multiplicity of suits. We cannot agree either that there will be a multiplicity of suits or, if there should be, that such a reason is a proper basis for an injunction. The fact that numerous individuals have a like interest with the one seeking an injunction will not give the court jurisdiction to enjoin assessment and collection of a tax. See *Robique v. Lambert,* 114 F. Supp. 305 (E. D. La.), affirmed *per curiam,* 214 F. 2d 3 (C. A. 5th), and *City of Seattle v. Poe,* 4 F. 2d 276 (W. D. Wash.).

Certainly it is evident that any question which appellant may be entitled to raise concerning the validity and scope of the proposed assessment can be decided in one suit for refund after the proposed tax is paid. Moreover, as to the others who are allegedly interested and who presumably might file actions at law, it is also evident that such actions may be unnecessary if they are in fact similarly situated. This is so because questions to be raised by such persons can undoubtedly be settled administratively after the law is decided in appropriate test suits.

In this connection it should be noted that statements in the affidavit of counsel for appellant [R. 79] were categorically denied by Alvin A. Underhill, Group Supervisor of the Excise Tax Group of the Audit Division in the Internal Revenue Service office in Los Angeles, who stated that he had never advised counsel for the appellant that he had been instructed to make assessments against

all of the automobile "trim shops" in his area, or that he intended to make assessments regardless of any objections by counsel. Underhill also stated that for more than two months he gave counsel and his client the opportunity to be heard and extended the time in order to permit them to compile facts on their situation, but no facts were ever presented and, instead of availing themselves of the administrative remedies which he offered, counsel filed this injunction suit. [R. 112-113.]

In support of its position here, appellant has cited many cases. An analysis of these will show that in the cases which are applicable (*i.e.,* cases in which taxpayers were seeking to enjoin the assessment or collection of a federal tax) the principle announced is the same as that set forth in the cases on which we rely. Thus, while some courts may have seemed to view a taxpayer's request more liberally than others, they have all indicated that the test for granting or denying an injunction is the presence or absence of extraordinary and exceptional circumstances. Among those cases in which injunctions were granted are *Miller v. Nut Margarine Co.,* 284 U. S. 498 (already discussed above); *Shelton v. Gill,* 202 F. 2d 503 (C. A. 4th) (in which an individual and a corporation were assessed as transferees but were in fact not transferees); *Mitsukiyo Yoshimura v. Alsup,* 167 F. 2d 104 (C. A. 9th) (in which taxpayer was illegally coerced into signing a waiver for assessment and collection of the proposed tax); and *John M. Hirst & Co. v. Gentsch,* 133 F. 2d 247 (C. A. 6th) (in which taxes under the Federal Unemployment Tax Act were assessed against mining partners not on salaries but on their distributive shares of partnership earnings and were protested both as invalid and as totally ruinous to their mining business). It will be seen that in all of the cases just referred to the decisions were

based on circumstances which were entirely different from those here and were in fact extraordinary and exceptional ones.

Appellant has also cited several cases involving state or municipal taxes. Among these are *Lee v. Bickell,* 292 U. S. 415; *Ogden City v. Armstrong,* 168 U. S. 224; and *Gramling v. Maxwell,* 52 F. 2d 256 (W. D. N. C.). Obviously such cases are not applicable as they did not involve the statutory provision being considered here.

The case which the appellant apparently relies on principally is *Allen v. Regents,* 304 U. S. 439, but that case is clearly distinguishable. Not only did the Supreme Court deny the injunction in that case but the regents of the state university who sought the injunction were not the taxpayers but collectors of the admissions taxes involved there. Consequently the principal question was whether the regents, as a state instrumentality, had a right to sue in equity to determine whether the collection of such tax was an unconstitutional burden on a governmental function of Georgia. A majority of the Court held that the suit could be maintained but that does not help the appellant for it is obviously in an entirely different situation. Moreover, as we have just pointed out, the injunction was denied in that case.

Another case strongly relied on by the appellant is *Graham v. du Pont,* 262 U. S. 234, which it cited to show that injunctions are to be denied only when there are mere errors or irregularities in tax assessments. But the quotation which appellant sets out in his brief on page 27 is not, as appellant asserts, a statement from the Supreme Court's opinion. Instead the quotation is taken from the summary of the respondent's argument (p. 246) which is printed with but is not a part of the Supreme

Court's opinion. As the decision therein was rendered in favor of the petitioner, *i.e.*, the former Collector of Internal Revenue, it is apparent that that case is also not helpful to the appellant here.

We submit that from the foregoing the appellant has not shown that it is entitled to the injunctive relief which it requests.

Conclusion.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

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(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

28 U. S. C.:

§2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * *

Internal Revenue Code of 1939:

SEC. 3403.[4] TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

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[4]None of the amendments to Section 3403 are relevant to the issues here involved and the language of the section may be regarded as substantially the same during the entire period in question.

(c) [as amended by Sec. 544 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687; Sec. 605(c)(1) of the Revenue Act of 1950, c. 994, 64 Stat. 906; and Sec. 481 (c) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *

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(26 U. S. C., 1952 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939:

Sec. 316.4. *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

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Sec. 316.55. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the

primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

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S. T. 944, 1952-2 Cum. Bull. 255:

Section 3403 (c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsection (a) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 percent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403 (c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut,

tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manfacturer's sale thereof.

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.

Because of the past rulings of the Bureau concerning the nonapplication of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791 (b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of

such seat covers prior to August 18, 1952, the date of this Bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443 (d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale.